Office - Supreme Court, U.S.
FILED
JAN 16 1984
ALEXANDER L. STEVAS
CLERK

No. 83-971

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

In the Matter of John R. Rafter, Deceased,

ROBERT V. RAFTER,

Appellant,

– against –

ELIZABETH R. HIGGINS and
GEORGE B. FARGIS,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

MOTION TO DISMISS OR AFFIRM

GEORGE B. FARGIS
Attorney for Appellees
Post Office Address
342 Madison Avenue
New York, New York 10173
(212) 682-1170

QUESTION PRESENTED

Whether Rule 500.2 of the New York State Court of Appeals, and that court's *sua sponte* action in dismissing the appellant's appeal to that court is federally unconstitutional, in that the rule does not carry provisions requiring notice or hearing with respect to dismissals *sua sponte*.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
MOTION TO DISMISS	1
MOTION TO AFFIRM	2
STATUTE INVOLVED	3
STATEMENT	3
ARGUMENT	6
CONCLUSION	8
CERTIFICATE OF SERVICE	9
APPENDIX	AA 1

No. 81-1594

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

In the Matter of John R. Rafter, Deceased.

ROBERT V. RAFTER,

Appellant,

- against -

ELIZABETH R. HIGGINS and GEORGE B. FARGIS,

Appellee.

On Appeal From the Court of Appeals of the State of New York

MOTION TO DISMISS

Appellees, Elizabeth R. Higgins and

George B. Fargis, respectfully move this Court to dismiss appellant's appeal from the order of the New York State Court of Appeals, dated September 18, 1983on the ground that Rule 500.2 of the New York State Court of Appeals is in keeping with orderly presentation of appellate matters and is not repugnant to the federal Constitution, and under further grounds, that in the absence of a final judgment before this Court, jurisdiction should be denied.

MOTION TO AFFIRM

Alternatively, appellees move for the affirmance of the order of the New York State Court of Appeals, on the grounds that appellant did not petition for a rehearing below and there are adequate nonfederal grounds for the order

of the court below to be sustained.

STATUTE INVOLVED

The involvement here is not a statute but is a rule of the New York State Court of Appeals regarding Jurisdictional Statements required to be filed under Rule 500.2 of said court. Appendix to this motion carries a copy of said Rule 500.2 (AA-1).

STATEMENT

Appellant filed a claim in the Surrogate's Court of Westchester County against the estate of his father, John R. Rafter. The claim was rejected by appellees. Subsequently, appellant moved to set aside the final estate decree, on the purported grounds of fraud and concerted concealment. The Surrogate refused to entertain said application and

same was rejected by order dated December 9, 1980 (not appended).

Appellant then sought mandamus in Supreme Court, Westchester County, to compel the Surrogate to act (A9). There is nothing in the papers before this court showing the end disposition of the mandamus proceedings.

Subsequently, appellant appealed the December 9, 1980 order of the Surrogate to the New York State Supreme Court, Appellate Division, Second Department (not appended).

The Appellate Division sustained the Surrogate by order entered June 1, 1981 (not appended).

Thereafter on or before August 25, 1981 appellant appealed to the New York State Court of Appeals (not appended). His Jurisdictional Statement to the Court

of Appeals (A-4) claimed that the concerted concealment in the Surrogate's Court was a denial of due process and equal protection of the law.

Subject matter was noted for appeal to the Supreme Court of the United States on December 24, 1981, from the order of the New York State Court of Appeals, dated October 27, 1981 (A-3).

The New York Court of Appeals dismissed appellant's appeal to that court sua sponte upon the grounds that appellant's order below in the Appellate Division did not finally determine the proceedings within the constitution of the State of New York (A-2).

Appellant Rafter foundations his appeal to this court on the sole grounds that Rule 500.2 of the Rules of the New York Court of Appeals is unconstitutional, in that appellant was not given

notice or hearing with respect to jurisdictional dismissal sua sponte by said court.[1] (Attached as Appendix AA-1 is a copy of the New York State Court of Appeals Rule 500.2.)

ARGUMENT

The Court of Appeals Rules, are in keeping with the orderly presentation of appellate matters. They are not repugnant to the federal Constitution. The right to seek certiorari in the Supreme Court for the review of a state court

---

1. Affixed to appellant's jurisdictional statement (A-14 through A-29) is material concerning matters in the federal court in regard to legal fees. Said material is completely unrelated and immaterial to the appeal to this court from the order of the New York Court of Appeals. It should accordingly be expunged from the statement.

judgment, exists by virtue of federal statute only. There are adequate nonfederal grounds for sustaining the order of the New York Court of Appeals, and in the absence of a final judgment jurisdiction should be denied by this Court.

Additionally, appellant's Jurisdictional Statement is confusing and is no more than a mishmash of legal notions. Completely unconnected is his statement of "The Question Presented" (Pg. i) relating to an oil monopoly claim, and his Jurisdictional Statement (Pg. 1) regarding his attack on the constitutionality of Rule 500.2(f) of the Rules of the New York Court of Appeals.

Appellant's contentions that he was deprived of his rights by the State Court of Appeals application of its Rule 500.2

is wholly without merit. There is a good reason to disregard his attack on this rather clear rule governing jurisdictional administration, particularly in a situation such as this, where the sole issue is the constitutionality of a procedural statute. This reason alone is grounds for dismissal of the appeal.

The Appellant Rafter bases his appeal to this Court on what he states are constitutional provisions involved and the state law under review, the state law under review being 5015 of the Civil Practice Law and Rules of the State of New York. The Court of Appeals Rules are in keeping with the orderly presentation of Appellate matters. They are not repugnant to the Federal Constitution. As stated in the appellee's previous motion to dismiss or affirm, the right to seek certiorari in the

Supreme Court for the review of a state court judgment exists by virtue of federal statute only.

Additionally, the appellant's jurisdictional statement is confusing and is no more than a mish mash of legal notions. Completely unconnected are his statements relating to an oil monopoly claim and his prior jurisdictional statement. There is good reason to disregard his attack on the rules governing jurisdictional administration, particularly in a case as this where the sole issue is the constitutionality of a procedural statute. This reason alone is grounds for dismissal of the appeal.

CONCLUSION

For the reasons stated herein, this appeal should be dismissed or the order below affirmed.

Respectfully submitted,

George B. Fargis
(Counsel of Record)
342 Madison Avenue
New York, N.Y. 10173
(212) 682-1170

Attorney for
Elizabeth R. Higgins
and George B. Fargis

CERTIFICATE OF SERVICE

I hereby certify that on the 12 day of January, 1984 three copies of the Motion to Dismiss or Affirm were mailed, postage paid, to Robert V. Rafter, Esq., Post Office Box 583, Rye, New York 10580, Counsel for Appellant.

APPENDIX

APPENDIX

PART 500-RULES OF PRACTICE

Section 500.2 Filing and Service of Appellant's Jurisdictional Statement

(a) Within 10 days from the time the appeal is taken, appellant shall file with the clerk one copy of a statement which shall recite:

(1) the title of the case;

(2) the court from which the appeal is taken;

(3) the date of service and filing of the notice of appeal or the date of entry of the order granting leave to appeal;

(4) the date and type of service upon the appellant of the order or judgment appealed from, and its notice of entry; and

(b) There shall be filed with the statement a legible copy of:

(1) the dated notice of appeal, or the order granting leave to appeal;

(2) the order, judgment or determination appealed from;

(3) any other order brought up for review;

(4) the opinion or memorandum of the Appellate Division or other intermediate appellate court;

(5) the order, judgment or determination reviewed by the Appellate Division or other intermediate appellate court; and

(6) the formal or informal findings and conclusions upon which the order, judgment or determination was entered.

(c) The statement must give the constitutional, statutory, case, or other authority supporting the assertion that the court has jurisdiction to entertain the appeal and to review the questions raised. It must include a point heading identification of all issues already raised and likely to be raised, for purposes of subject matter indexing and calendaring; inclusion and identification of issues shall not be binding on counsel for brief writing or oral argument purposes.

(d) The filing of this statement is mandatory in all cases and, simultaneously with the filing, appellant shall serve counsel for all parties with a full set of the papers required by this section.

(e) Where a party will assert that a statute is unconstitutional, notice shall be given to the Attorney General in writing at the time of filing this jurisdictional statement, and a certification of the notification shall be included in this statement. The notification and a copy of the statement under this section must be sent to the attention of the Solicitor General at Albany, New York.

(f) This court may determine, sua sponte, whether it has subject matter jurisdiction and authority to review, based on the papers submitted in accordance with this section and on such other written argumentation as may be sought.